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No. 305.

In the

Supreme Court of the United States

OCTOBER TERM, 1954.

FRANCIS G. A. O'NEILL,

Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Respondent.

BRIEF OF RESPONDENT ON MERITS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 105.

FRANCIS G. A. O'NEILL,
Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Respondent.

BRIEF OF RESPONDENT ON MERITS.

I.

QUESTIONS PRESENTED FOR REVIEW.

1. In an action under the Federal Employers' Liability Act where the uncontroverted evidence shows that a heavy ash pan was hoisted by a manual jack operated from above

by another employee of the respondent railroad and that the ash pan fell and struck petitioner, a boilermaker, because a bolt supplied from respondent's stock bin suddenly and without explanation broke, was the District Court correct in submitting the case to the jury on a permissible inference of defendant's negligence under res ipsa loquitur?

2. Did the Court of Appeals for the Sixth Circuit correctly hold that the District Court should have granted respondent's motion for a directed verdict upon the ground that although the evidence reasonably supported an inference of negligence on the part of respondent, such inference was rebutted as a matter of law by evidence that petitioner selected two new bolts from respondent's stock bin and that respondent customarily purchased such bolts from another company?

3. May x-ray reports, made by specialists to respondent's doctor and at his request and incorporated into the records of a hospital, be admitted into evidence on cross examination of that doctor under the provisions of Section 1732, Title 28, U. S. C.?

4. When such x-rays reports were admitted into evidence on cross examination of respondent's doctor to show the basis for the doctor's previously stated opinion on direct examination and were limited by the court to that purpose, was error prejudicial to the respondent committed when the court later commented on those reports to the jury?

5. Should the District Court have sustained defendant's motion to strike all of the testimony of Dr. Harold E. Clybourne from the record and have admonished the jury to disregard said testimony, except as said testimony pertained to the injury to the eighth dorsal vertebra?

6. Did the District Court err in instructing the jury that plaintiff would suffer some humiliation?

7. Did the District Court misstate the rule of res ipsa loquitur in its instruction to the jury?

8. Did the District Court err in instructing the jury that although Jaynes was under the supervision of the plaintiff that that did not make any difference because the assumption of risk is not part of this case?

9. Did the District Court err in instructing the jury to disregard Safety Rule 86 of the defendant?

10. Did the District Court err in instructing the jury regarding an aggravation of a pre-existing injury?

11. Did the District Court err in instructing the jury to disregard the fact that plaintiff received unemployment compensation benefits from the Railroad Retirement Board?

12. Did the District Court make a misstatement of law in charging the jury as follows:

> "Also, as I have heretofore instructed you, if you find by a preponderance of the evidence the defendant was not guilty of negligence which was a direct and proximate cause of the injuries to plaintiff, and you also find that negligence of the plaintiff contributed to his injuries, your verdict shall be for an amount representing the total amount of damages reduced by an amount in proportion to the amount of negligence if any, attributable to plaintiff." (R. 141.)

13. Did the District Court make a misstatement of law in charging the jury as follows:

> "I also perhaps did mention something to the effect that the plaintiff couldn't blindly go ahead. I did that after I had given you the definition of ordinary care. If the defendant's conduct came up to that standard of care which in law is called ordinary care, it was not negligent and it is not liable to this plaintiff no matter what damage resulted from such conduct. That is a repeat of what I just said; if they are not negligent he can't recover from them. But, it is in again. If his conduct fell below such standard of

care then it was negligent, and if such conduct was the direct and proximate cause of the damages complained of, then the plaintiff may recover. Likewise, the plaintiff is required to exercise that degree of care for his own safety that is required of the defendant; that is, ordinary care. And, forget the 'blindly' part. I was just trying to emphasize something. I realize that sometimes you emphasize and give the wrong impression. The definition of ordinary care is what I want you to follow." (R., 153, 154.)

14. Did the District Court err in instructing the jury as follows:

"But, $300 a month is the figure that you would take into consideration and the years that have been outlined, and the percentage of disability covering those years. I give you those figures without building up anything at all, but the matter of damages is for you, taking everything into consideration." (R., 155.)

15. Did the District Court abuse its discretion in commenting on the evidence?

II.

SUPPLEMENTAL STATEMENT OF THE CASE.

This case was tried before Judge Francis Picard of the Eastern District of Michigan. Evidence was produced by respondent that petitioner was in charge of the work of installing the ash pan, and he had as a helper an employee by the name of Roy Jaynes (R., 35). The helper was operating the pull jack pursuant to the directions of the petitioner (R., 35). The ash pan was hoisted up part way, and then petitioner testified he and his helper let it back down so that they could get another hold on it (R., 37, 48). After making an adjustment to the chain, the helper started to

hoist the pan, and the bolt broke before the pan was hoisted into position (R., 16). Petitioner failed to call Roy Jaynes as a witness.

Immediately after the accident petitioner was taken to the Newark City Hospital where he was treated. On June 25, 1948 petitioner returned to his employment. (R., 20-21.) Petitioner then reported for work daily until September 14, 1948. (R., 21.) In his complaint petitioner alleged that during this period he performed light duties. (R., 2.) However, in his testimony he stated that he did not perform any duties during this period and that he left this employment on September 14, 1948 because of his inability to perform his work. (R., 21.) He returned to work on February 21, 1949 and performed his regular duties until March 7, 1949 when he was furloughed. He was called back to work on April 4, 1949 and worked until April 8, 1949 when he was again furloughed. After that petitioner applied for and received unemployment compensation benefits from the Railroad Retirement Board until February 25, 1950. He was called back to work by the respondent on September 8, 1949 but failed to return. However he continued to apply for and receive unemployment compensation from the Railroad Retirement Board. (R., 43.)

Petitioner testified that at the request of his attorney he was examined by Dr. Clybourne on three different occasions so that the doctor could testify in his behalf in this case. He stated that the doctor took a case history on three different occasions for the purpose of making a diagnosis. The petitioner stated that he did not tell Dr. Clybourne anything about a previous nervous and goiter condition or the fact that he had sustained three injuries prior to June 22, 1948; one on June 11, 1947 to his eye, a fracture of his left hip on August 24, 1947,

and a subsequent back injury for which he was off work for over 3 weeks. Petitioner admitted that he told nothing about these injuries to Dr. Clybourne but admitted that he informed Dr. Pickett, the company doctor, on the day of the accident about his previous back injury. (R., 33, 34.)

Dr. Clybourne testified that he had examined petitioner on three different occasions at the request of counsel for the petitioner and not for the purpose of treatment. (R., 75.) Dr. Clybourne testified that X-rays taken at the first examination on August 1, 1949 showed a compression fracture of the eighth dorsal vertebra. On cross examination Dr. Clybourne testified that he took a complete history from the petitioner and went at him from different angles on three different occasions and reviewed the histories carefully so that there would be no discrepancies. However, Dr. Clybourne admitted that the petitioner did not tell him about his back injury which had occurred prior to June 22, 1948. On this point Dr. Clybourne testified as follows:

> "Q. Now, did he tell you about having had a back injury prior to the occurrence of June 22, 1946? He didn't did he? A. No, no, he did not." (R., 73.)

Dr. Ralph Pickett was called as a witness for the respondent and he testified that he was called to the scene of the accident and that he gave petitioner first aid and then took him to the hospital where X-rays were taken of petitioner's back. Dr. Pickett testified that the X-rays revealed that there was an old compression of the eighth dorsal vertebra which antedated the accident of June 22, 1948. (R., 85.)

Respondent's witness Kessler testified that the practice of the respondent was to buy its nuts and bolts pursuant to specifications and to inspect the nuts and bolts either at the plant of the manufacturer or make the inspection at the storehouse of the respondent. (R., 78.)

III.

SUMMARY OF ARGUMENT.

The Court of Appeals for the Sixth Circuit has correctly decided that where a plaintiff offers no evidence pertaining to the issue of negligence other than the statement that an accident happened, and the explanatory facts are sufficient to rebut an inference of negligence, he has failed to meet his burden of proof. On the record presented to it, the Court of Appeals correctly held that a verdict should have been directed for the respondent. The Court of Appeals correctly held that no inference could be drawn that petitioner's helper used improper and excessive force in operating the pull jack. (R., 176.) The Court of Appeals correctly held that an inference of a defective bolt was rebutted as a matter of law by the undisputed evidence that the bolt was a new bolt, and that it was purchased by respondent, in the usual course of business without notice of a defect. (R., 179.) The Court of Appeals correctly held that X-ray reports containing opinions, conclusions and analysis by doctors are not admissible under the Federal Shop Book Rule, Title 28, U. S. C. Section 1732. (R., 180.) The Court of Appeals correctly held that the X-ray reports were admissible to show the data on which Dr. Pickett's opinion was based when the proper foundation was laid, providing the court properly limited the use of such evidence. (R., 181.) The Court of Appeals correctly held, however, that it was error for the court to comment on the reports to the jury as being substantive testimony concerning the injury. (R., 181.)

The hypothetical question to Dr. Clybourne related only to an injury to the eighth dorsal vertebra. (R., 67.) There-

fore, all testimony of Dr. Clybourne that did not pertain to the eighth dorsal vertebra should have been stricken from the record, and the jury instructed to disregard it.

The District Court erred in its instruction to the jury in injecting the issue of humiliation into the case as an element of damages when it was not an issue in the case (R., 140, 141, 153); misstated the rule of evidence known as res ipsa loquitur, and caused such confusion in the minds of the jury that they could not possibly know what res ipsa loquitur meant (R., 133-138, 153); erred in instructing the jury that although the helper was under petitioner's supervision, this did not matter because the assumption of risk was not an issue in the case (R., 136); erred in instructing the jury to disregard a safety rule of the respondent that prohibited an employee, such as petitioner, from working under a load being hoisted by a mechanical device (R., 137); erred in charging the jury regarding a pre-existing injury when that was not an issue in the case (R., 139); erred in charging the jury that they should disregard the conditions under which petitioner received unemployment compensation benefits when it was agreed that he had to certify each time he received his weekly check that he was able and willing to work (R., 25, 26, 140); erred in charging the jury that if they found the respondent not guilty of any negligence and the petitioner guilty of contributory negligence, they could still return a verdict for the petitioner (R., 141); erred in instructing the jury that if petitioner's conduct fell below such standard of care, then respondent was negligent (R., 153, 154); erred in instructing the jury to use the figure of $300.00 per month for 24.10 years in computing damages when the evidence was that petitioner immediately prior to the accident earned around $285.00 or $300.00 a month, and

petitioner's counsel had read into the record that the table showed that the petitioner had a life expectancy of 24.10 years (R., 155); abused its discretion in commenting on the evidence by stressing and overemphasizing petitioner's theory of the case, while at the same time completely nullifying respondent's theory of the case.

Since the retrial was ordered, the court found it unnecessary to rule upon the objections relating to the conduct of counsel for petitioner in his argument to the jury and the right of the trial judge to grant a remittitur instead of a new trial. This portion of the record is not before this court unless the court refers to the complete record filed with the petition for certiorari as suggested by petitioner. In view of the court's charge alone, the Court of Appeals was compelled to order a new trial.

IV.

ARGUMENT.

1. In an action under the Federal Employers' Liability Act where the uncontroverted evidence shows that a heavy ash pan was hoisted by a manual jack operated from above by another employee of the respondent railroad and that the ash pan fell and struck petitioner, a boiler-maker, because a bolt supplied from respondent's stock bin suddenly and without explanation broke, was the District Court correct in submitting the case to the jury on a permissible inference of defendant's negligence under res ipsa loquitur?

2. Did the Court of Appeals for the Sixth Circuit correctly hold that the District Court should have granted respondent's motion for a directed verdict upon the ground that although the evidence reasonably supported an inference of negligence on the part of respondent, such inference was rebutted as a matter of law by evidence that petitioner selected two new bolts from respondent's stock bin and that respondent customarily purchased such bolts from another company?

Petitioner contends that the jury could properly infer that excessive and improper application of force from the helper, Jaynes, caused the bolt to break and the pan to fall. An examination of petitioner's testimony readily reveals there could not possibly be an inference of improper or excessive application of force by the petitioner's helper. (R., 4-48.) Petitioner testified as follows:

> "Q. And, the position that the court just referred to is the position so that you can do what with this ash pan? A. To steady it and get it up into position.

Q. What is the position, what does that mean? A. to go on up with it.

Q. To where? A. Up to fasten on to the ash pan wing.

Q. When you get it in that position, then what are you able to do? How do you fasten it to the engine? A. If we had got it into position we would have fastened it through the half-inch holes into the ash pan wing, and the half-inch holes were into the ash pan where they come together and would place half-inch bolts between there to hold it.

Q. Now, did you get it in that position? A. No, sir.

Q. What happened? A. The bolt broke and down came the pan. * * *" (R., 15.)

Petitioner's testimony conclusively proves that petitioner's helper did not use improper of excessive force in hoisting the ash pan. The ash pan was dangling on the chain, and petitioner was guiding it, and the bolt broke before the pan was hoisted into position.

Petitioner contends that the permissive inference of a defective bolt was not rebutted as a matter of law. Petitioner argues that even though he selected a new bolt, this did not have anything to do with the case. It certainly did have something to do with the case. It established the fact that the bolt was a **new** bolt. Respondent's witness, Kessler, testified that it was the practice of the respondent to purchase its bolts pursuant to specifications and inspect the bolts either in the plant of the manufacturer or in the shops of the respondent. (R., 78). This uncontroverted evidence established that it was the respondent's habitual and established method of doing business to purchase its bolts pursuant to specifications and inspect them either in the plant of the manufacturer or in the shops of the respondent. This

uncontroverted testimony established the fact that the new bolt selected by the petitioner was purchased and inspected in this same manner.

Petitioner states that even if there is uncontroverted explanatory facts, the court still cannot direct a verdict in a res ipsa case. This is not the law and is even contrary to the cases cited by petitioner: Chicago & N. W. R. Co. v. Green, 164 Fed. 2d 55; Propper v. Chicago R. I. & P. R. Co., 54 N. W. 2d 840; Atchison, T. & S. F. Ry. Co. v. Simmons, 153 Fed. 2d 206; Terminal Railroad Association of St. Louis v. Staengel, 122 Fed. 2d 271. See also the following cases where it is held that any initial inference of negligence is entirely rebutted by undisputed, explanatory evidence; Shankwiler v. B. & O. R. Co., 148 Fed. 2d 195, C. A. 6th; Dierks Lumber & Coal Co. v. Brown, 19 Fed. 2d 732; C. A. 8th; Gray v. B. & O. R. Co., 24 Fed. 2d 671, 673-674, C. A. 7th; Asprodites v. Standard Fruit & Steamship Co., 108 Fed. 2d 728, C. A. 5th; Black Mountain Corp. v. Partin's Admr., 243 Ky. 791, 796-800; Dunning v. Ky. Utilities Co., 270 Ky. 44; Roanoke R. & Electric Co. v. Sterrett, 108 Va., 533, 62 S. E. 385; Christensen v. Oregon Short Line R. Co., (Utah) 99 Pac. 676.

The case of Lavender v. Kurn, 327 U. S. 645, cited by petitioner is not in point because the evidence in that case was conflicting and capable of different inferences. The cases of Gleeson v. Virginia R. R. Co., 140 U. S. 435, and Fink v. N. Y. C. R. Co., 144 O. S. 1, cited by petitioner, involved railroad passengers injured by derailments which are entirely different factual situations from the instant case.

Petitioner states that the court misinterpreted the reasoning of this court in the case of Sweeney v. Erving, 228 U. S. 233. Petitioner contends that this court held that once an

inference of negligence has arisen, no matter what the explanation is, the court cannot direct a verdict, but must submit the case to the jury. These same arguments were advanced in the case of Gray v. B. & O. RR. Co., 24 Fed. 2d 671 (CA 7th). The court correctly disposed of these arguments and at page 673 of its opinion stated:

> "Taken in connection with the whole paragraph quoted, we understand that, in using the words 'that they make a case to be decided by the jury' the Court meant that, unexplained, the facts make a case for the jury. Otherwise, that clause would be inconsistent with those other clauses, 'it is evidence to weighed, not necessarily to be accepted as sufficient,' and 'they call for explanation or rebuttal, not necessarily that they require it.'
>
> "If we should hold, under the facts in this case, that on the theory of res ipsa loquitur the case must go to the jury such a holding would not be in harmony with Small v. Lamborn, 267 U. S. 248, 45 S. Ct. 300, 69 L. Ed. 597, when the Court resorted to a well known rule:
>
> "'The rule for testing the direction of a verdict, as often has been held, is that when the evidence is undisputed, or of such conclusive character that if a verdict were returned to one party, whether plaintiff or defendant, it would have to be set aside in the exercise of sound judicial discretion, a verdict may and should be directed for the other party.'"

Unsupported by any authority, petitioner makes the broad assertion that respondent is liable for a negligent defect in its equipment, new or old, and whether purchased from others or not. Petitioner has not attempted to answer the well considered opinion of the Circuit Court in this case, nor has he discussed the cases cited by the Circuit Court. (R., 179.)

3. May x-ray reports, made by specialists to respondent's doctor and at his request and incorporated into the records of a hospital, be admitted into evidence on cross examination of that doctor under the provisions of Section 1732, Title 28, U. S. C.?

4. When such x-rays reports were admitted into evidence on cross examination of respondent's doctor to show the basis for the doctor's previously stated opinion on direct examination and were limited by the court to that purpose, was error prejudicial to the respondent committed when the court later commented on those reports to the jury?

The Circuit Court of Appeals held that it was error to admit in evidence the separate written reports of two doctors, which contained their opinions and conclusions of the x-ray films of the injury. By admitting these reports (Pl. Ex. 4; R., 110, 158, Pl. Ex. 5; R., 113, 159), the trial court forced the respondent to offer two additional expert witnesses who were not under oath and who were not subject to either direct or cross examination. The jury took these two witnesses—their medical reports—to the jury room during their deliberations. The Circuit Court correctly held that any effect of the trial judge's admonition at the time the reports were offered and received as evidence was nullified by the following discussion of this evidence by the trial court in its charge to the jury (R., 139.):

> "Now, Doctor Pickett, who was the company doctor, had some other x-rays taken about three or four months later, wasn't that it, from June to September, and Doctor Pickett got reports from these two doctors. The court permitted that testimony when they brought the hospital record here, and under any circumstances, I think, the court should have permitted it. But one of those doctors, I have forgotten which one, said that while he thought it was an old injury, he would not rule out some other theories, that it was not an old

injury. And the other doctor, as I remember, sat on the fence, I think, even more than the other. Isn't that true? So you have got plenty of evidence here (fol. 241) that it is an old injury and not something that happened then, and you have testimony that shows that you can't rule out entirely that it was not an old injury. In other words, this jury can find from the testimony here, depending upon which you believe, with the knowledge that this man admits that in '45 or '46 he did suffer an injury, that he has been off the railroad at different times since, but that he was doing his work at that time and had been on the job for some time. You take it all into consideration."

The Circut Court of Appeals held that these medical reports were not admissible as entries of acts or occurrences made in the regular course of business under the Federal Shop Book Rule. Title 28, U. S. C., Section 1732. Petitioner claims that the court was in error, since these records were part of the hospital record of the petitioner and, therefore, admissible per se. Petitioner in effect contends that it is immaterial under the Federal Shop Book Rule whether the record is a statement of an "act" or "occurrence," or whether it also contains the conclusions or opinions concerning such "act" or "occurrence" either performed or observed by the person making the record. Petitioner's logic completely ignores the ruling of this court in Palmer v. Hoffman, 318 U. S. 109, that the test of admissibility must be "the character of the records and their earmarks of reliability * * * acquired from their source and origin and the nature of their compilation."

The United States Circuit Court of Appeals for the District of Columbia clearly sets forth the type of documents or records admissible or inadmissible under the Federal Shop Book Rule in the case of New York Life Insurance Co. v. Taylor, 147 F. (2d) 297. In holding that it was error

to admit into evidence under the rule records that give an opinion or a diagnosis, the court said:

> "To admit a narrative report of an event, or a conversation, or a diagnosis, as a substitute for oral testimony, is to give any large organization the right to use self-serving statements without the important test of cross examination. Cross examination is unimportant in a case of systematic routine entries made by a large organization where skill of observation or judgment is not a factor. We believe that Palmer v. Hoffman restricts the application of the Federal Shop Book Rule statute to that type of business entries."

In the appeal after the second trial of the issue, the defendant again claimed that the court erred in excluding certain hospital records. New York Life Insurance Co. v. Taylor, 158 F. (2d) 328. The court stated that they had thoroughly discussed this question on appeal from the first trial and upon the motion for rehearing. The court, however, said at page 329 of its opinion:

> "But, in the interest of clarification, we deem it proper to add that our former decision does not hold that hospital records, per se, are inadmissible under the Federal Shop Book Rule. In both trials below dozens of such records were received, and only those rejected which constituted hearsay, opinion or diagnosis, about which equally competent men could differ, and as to which cross examination is necessary in eliciting the truth."

After claiming that the separate written reports of the two doctors are admissible merely because they were incorporated into the hospital records, petitioner alleges the records are also admissible merely because they are "trustworthy." They are "trustworthy" in petitioner's opinion because: (1) they were signed by the doctors themselves, and (2) the hospital record was signed by Dr. Pickett, the respondent's witness. Respondent makes no claim that the

pinions, conclusions and analysis made by the doctors were ishonest or slanted either in its favor or disfavor. They re inadmissible because they express the conclusions and pinions of doctors who were not called upon as witnesses nd which the respondent had no opportunity to cross xamine as to the basis or foundation of such conclusions. t is submitted that the Federal Shop Book Rule should not e extended to matters where observation, opinion and udgment are factors, and we believe this court has so re-tricted the rule in Palmer v. Hoffman.

Petitioner argues that even if the Circuit Court of Appeals was correct in excluding the written reports, nevertheless their admission was not prejudicial to the respondent. In support of his contention he claims that there was ample evidence that the compression fractures of petitioner's back were not old fractures. It will be noted that petitioner presented only two medical witnesses. Dr. Ridgeway, the first of these witnesses, stated that he first saw petitioner only three days before the trial, which was almost four years after the accident. (R., 49.) He testified on inquiry from the trial judge that he could not tell by looking at the X-rays whether the compression had come on in the last two or three years or ten years ago, and, therefore, he had to rely on what the patient told him. (R., 55.) Dr. Clybourne, the only other medical witness of the petitioner, testified by way of deposition that he first saw petitioner on July 27, 1949, over a year after the alleged incident (R., 57); that he relied on the case history given by petitioner (R., 71, 72), and that from the X-rays alone he could not tell "what date the thing was hurt". (R., 72.) The sole medical testimony of petitioner was based on petitioner's own statements as to when and where his compressed fractures occurred. Only Dr. Pickett, the respondent's witness,

saw petitioner immediately after the accident. In view of the lack of competent medical evidence presented by the petitioner, it is impossible to comprehend his contention that there was overwhelming evidence that the compression fractures aof petitioner's back were a result of the accident of June 22, 1948. His lack of medical evidence clearly shows the prejudice to this respondent, when the trial court not only admitted records of opinions and conclusions of doctors who were not present at the trial, but told the jury that they should take into consideration the opinions and conclusions expressed by these doctors in their records.

The petitioner's final contention is that these reports are admissible since they were made by specialists at the request of a doctor retained by respondent and that, therefore, the doctor adopted them as his own. There is nothing in the record to show that Dr. Pickett adopted the records as his own. In fact, the record shows that he disagreed with the diagnosis and opinions set forth in the report of Dr. Erhard. (R., 116.)

5. Should the District Court have sustained respondent's motion to strike all of the testimony of Dr. Harold E. Clybourne from the record, and have admonished the jury to disregard said testimony, except as said testimony pertained to the injury of the eighth dorsal vertebra?

After Dr. Ridgeway testified, counsel for petitioner, to conclude his case, read the deposition of Dr. Harold E. Clybourne. Dr. Clybourne testified that he had examined the petitioner on three different occasions at the request of counsel for petitioner for the purpose of testifying and not for the purposes of treatment. (R., 75.)

Dr. Clybourne testified that petitioner had a splinting of the entire spine on motion with pain developing in the mid-

dorsal area; that palpatory examination showed that the spinus processes of the sixth, seventh and eighth dorsal spines were sensitive to palpation, and that they would not move on side bending or torsion; that there was a fixation of the sixth, seventh and eighth ribs on the right side; that there was intercostal nerve involvement in the right side; that the intercostal nerve pain was aggravated by any type of motion; that the fixation of the ribs caused a sharp, stabbing pain along the course of the nerve as the stress was thrown in that area; that on the examination of August 1, 1949 petitioner had a marked intercostal neuritis on the right side involving the seventh, eighth and ninth intercostal nerves; that spondylitis had extended not only down the spine but it had gone up the spine into the lower cervical, or neck area; that his whole spine was sore; and that petitioner had a permanent disability of the spine of fifty per cent. (R., 58, 59, 62, 64, 66.)

At the conclusion of Dr. Clybourne's testimony, counsel for petitioner asked the following hypothetical question:

> "Q. I believe I neglected to ask you this question: Assuming that Mr. O'Neill on June the 22nd, 1948, while engaged in his employment with the B. & O. Railroad was standing in a crouched position in a pit with his hands elevated to guide an ash pan which gave way striking Mr. O'Neill about the face and body, wedging him against the pit in the portion of the engine, I will ask you whether or not the condition that you found on the occasion of your first examination **with respect to the condition of the eighth dorsal vertebra**, whether or not that condition was in any way associated with the injury of the—on June the 22nd, 1948, as related by you?" (R., 67.) (Emphasis ours.)

Since the hypothetical question pertained only to the condition of the eighth dorsal vertebra, all of Dr. Clybourne's testimony, except as it pertained to the eighth dorsal ver-

tebra, should have been stricken from the record pursuant to respondent's motion, and the jury instructed to disregard the same.

In so far as the eighth dorsal vertebra was concerned, Dr. Clybourne testified that the condition of said vertebra was as follows on August 1, 1950:

> "Q. I will ask you if you had occasion to examine Mr. O'Neill any time subsequent to that date? A. Yes, I examined him 8-1-50 at Doctors Hospital.
>
> Q. All right. Now, will you tell us, Doctor, what your examination disclosed at that time with reference to the eighth dorsal vertebra? A. We showed the anterior wedging of the eighth dorsal vertebral body and it showed that the fracture was well healed at the present time—at the time of the examination." (R., 64.)

The court should have instructed the jury that they could only consider Dr. Clybourne's testimony as it pertained to the eighth dorsal vertebra and they should have been instructed to disregard the rest of his testimony. The prejudice to the respondent is apparent.

6. Did the District Court err in instructing the jury that petitioner would suffer some humiliation?

The court's charge to the jury was as follows:

> "There is no humiliation that I can think of, except where a man is physically unable to do a whole day's work. If that is what is meant by humiliation, yes. Both in the past and what may be reasonably anticipated in the future." (R., 140 and 141.)

The respondent excepted to the court's charge and after the jury was recalled, the court charged the jury as follows:

> "Now, there is a question of humiliation here. The word was used. It happened because **I was quoting from another charge.** I think that you understood

the limitation I put upon humiliation, and that is the humiliation that comes when a young man, a comparatively young man, fifty, is unable to do a full day's work at his job. That is all. That is a humiliation. I don't think that there is any other humiliation, and personally, I don't think that's a great deal of humiliation, either." (R., 153.) (Emphasis ours.)

The charge the court was quoting from involved a case where the petitioner had lost an arm, and humiliation was an element of damages. In the instant case, the petitioner made no claim for damages for humiliation. This was not an issue in the case and it was prejudicial error for the court to instruct the jury on this element of damages.

7. Did the District Court misstate the rule of res ipsa loquitur in its instruction to the jury?

The court both misstated the rule and so confused the jury as to the purpose and intent of the rule that the respondent was in fact charged out of court. After stating that the "doctrine of res ipsa loquitur applies in this kind of a case" (R., 134), the court charged the jury as follows:

"The Court: What does that mean? Does that mean that the plaintiff is entirely absolved from showing negligence? No, but it recognizes, and these states that have this doctrine recognize this: That sometimes you can't prove negligence is in somebody else's possession. You can't prove it. It is there but you can't prove it. Or, it may not be there. I don't say it is necessarily there. Don't understand me as saying that. And so, they have this rule that says, 'The thing speaks for itself.'

You go down the street and you see a locomotive—I will get away from a locomotive—you see an automobile on somebody's front porch. Now, in Michigan you would have to show the negligence there, you see. But under this rule you don't have to show the negligence, if it answers these three requirements: That

the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; second, it must be caused by an agency or instrumentality within the exclusive control of the defendant; third, it must not have been due to any voluntary action or contribution on the part of the plaintiff. Now, that does not mean any contribution at any one time, but as the accident happened.

The Supreme Court of the United States has defined res ipsa loquitur. It means 'that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference'. So you can, from the facts in this case, infer that there was negligence that caused it somewhere. You see, you can infer that. You can infer that the negligence was entirely on the part of the defendant. You can infer from what happened that there was no negligence on the part of the defendant, or you can infer that there was no negligence on the part of the plaintiff.

When you get in there you begin saying, 'Well, here is what happened.' Nobody saw the bolt break, as I understand, and there is no evidence here whether or not it was a defective bolt necessarily, and there is no evidence one way or the other whether the man who was up above did something he shouldn't have done, by exerting a certain pressure at a certain time. But, you have the right to infer that, or, you have the right to say, 'This is entirely due to the negligence of the plaintiff in this case.'

I go on with the definition of res ipsa loquitur: '* * * that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that the facts call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict.' I don't know how I can explain it to you any better than in the language of the Supreme Court." (R., 134, 135.)

* * * * * * * * * *

"Now, it is up to you to determine whether or not they are guilty of negligence, and under the doctrine

of res ipsa loquitur they don't have to prove to you where the negligence lies, I mean the exact nature of the negligence. You can, from the thing itself, determine if there was negligence and what the negligence was; that is, unless it has been rebutted by some testimoney here of the defendant." (R., 137, 138.)

* * * * * * * * * *

"Remember that I have said all the way through that the plaintiff must prove the negligence, but in a case of this kind you may infer negligence if you believe that the facts so warrant.

Now, the court said it couldn't see how this man could have performed his work in any other manner. If you jurors think he could, from the evidence as you know it, that is up to you and you are not to be biased by what I think the facts show at all. You are the judges of the facts, not me. The evidence, of course, in some cases is really, perhaps, more complete, but that is what makes, in my opinion, this case a case of res ipsa loquitur. Let the thing speak for itself." (R., 154.)

In the foregoing portion of its charge regarding res ipsa loquitur, the court says that the ruling is applicable in a case where you can't prove negligence and that the proof is in somebody else's hands. That "somebody else" can refer to no one except the defendant in this case. The jury could not interpret this language other than a directive to it that the respondent has the burden of proving it was not negligent. The court then says that the reason the petitioner does not have to prove negligence is that "the thing speaks for itself." The court at no time states what "thing" he is referring to. The jury could reasonably infer from the court's statement that the fact that the petitioner was injured is the thing that speaks for itself—or that because the petitioner was in an accident, the thing speaks for itself —or that the fact that the petitioner brought this action against the respondent is the thing that speaks for itself.

As stated by Mr. Justice Holmes in Southern Railway Co. v. Bennett, 233 U. S., 80:

> "The instruction is criticized further as if the charge had said **res ipsa loquitur**—which would have been right or wrong according to the **res** referred to."

Here the court made no attempt to instruct the jury as to the res—or thing he is referring to as speaking for itself. The language of the court is confusing and misleading and the error is patent.

The court then attempts to give what he calls an illustration of the rule—"You go down the street and you see a locomotive—I will get away from a locomotive—you see an automobile on somebody's front porch."—In such a case the court states that under the law of Michigan you would have to prove that somebody was negligent but that under this rule you don't have to show the negligence. When counsel for the respondent objected to this illustration because of its complete inapplicability to any facts of the record or as illustrating this rule of evidence, the court reinstructed the jury as follows:

> "Now, you remember, I tried to give you an example, tried to show the difference between this kind of a case where I feel the doctrine of res ipsa loquitur applies and one where it does not, and I gave you a situation of an automobile running up on a front porch. Well, there is no automobile in this case, ladies and gentlemen, and there is no front porch, so far as I know. I just tried to give you an example. So, you can forget the automobile on the front porch as though I never said it to you at all. You can forget it entirely." (R., 152.)

Now, whereas the court in instructing the jury had given the situation of the automobile being on the front porch as an example of illustrating the rule of res ipsa loquitur, in recharging the jury he informed the jury that it was

not intended as an example. From the aforesaid, it can readily be seen that the jury had no conception as to the application of the rule from the instructions given to them by the court. In fact, the instruction of the court was misleading, confusing and erroneous.

In quoting from the Supreme Court of the United States in the case of Jesionowski v. Boston & Main R. R., supra, as to the meaning of res ipsa loquitur, the court again did not define the res or thing that he was referring to.

The court completed its charge on res ipso loquitur by again reading from the decision of the Supreme Court of the United States in the Jesionowski case. It is not necessary to comment upon the impropriety of reading an appellate case and reading that part of the decision which holds that it makes a case to be decided by the jury, not that it forestalls a verdict that has been granted for the plaintiff in the case.

8. Did the District Court err in instructing the jury that although Jaynes was under the supervision of the petitioner, that did not make any difference because of the assumption of risk is not part of this case?

The court instructed the jury as follows:

> "Two men were working on this job, and there is no question but what the man up above was under the supervision of the plaintiff here, but I instruct you now that that does not make any difference because the assumption of risk is not a part of this case. He does not assume the risk of a fellow employee." (R., 136.)

The court clearly stated that the evidence was uncontraverted that Jaynes, the helper, was under the direct supervision of the petitioner. However, the court stated that such fact was not material as the assumption of risk was

not part of this case. The charge was erroneous, misleading and completely confusing for the following reasons: First of all, the assumption of risk was no more an issue in this case than was an action for breach of contract. Furthermore, the court failed to differentiate between assumption of risk, sole negligence and contributory negligence. It will be noted how peculiarly prejudicial this charge was to the respondent as the court at no time defined assumption of risk. Under this charge, the jury was undoubtedly misled into believing that the action of the helper, Jaynes, who was subject to the petitioner's supervision, even though instructed by the petitioner, had no bearing on the petitioner's right to recover. By so charging, the court effectively erased from the jury's consideration any question bearing on contributory or sole negligence.

9. Did the Court of Appeals correctly hold that the District Court was right in ruling that Safety Rule 86 was not applicable to the petitioner?

The court instructed the jury to disregard Safety Rule 86. (R., 137.) On cross examination the petitioner admitted the violation of Safety Rule 86. (R., 46.) On cross examination, petitioner admitted that he placed a pit board across the tracks after the bottom of the pan cleared the pit. (R., 37.) Petitioner further testified on cross examination that after the pan was jacked up to the approximate position where he wanted it he could have placed blocks under the ash pan. (R., 39, 40.)

Safety Rule 86 was an issue in the case. The rule was adopted to cover just such a situation as this. The petitioner was working under an ash pan which was being hoisted in the air by a mechanical device. Petitioner even

testified he could not see the operator of the hoist above him. What more dangerous situation could there be? Petitioner admitted he was familiar with Rule 86. (R., 46.) He testified that he put a board across the pit after the pan cleared the pit so he could put the pan back down on it. This illustrates that if he had had any interest in his own safety, he would have put some blocks under the pan as it was being hoisted. How could the court find that the rule was not intended to cover such a situation? The rule is plain and unambiguous, and was adopted to prevent men from working under loads being hoisted by a mechanical device. The rule was adopted to prevent accidents to employees such as the petitioner. The District Court should have instructed the jury regarding this rule, instead of telling them to disregard it.

In the case of Lasagna v. McCarthy, et al., 111 Utah 269, 177 P, 2d, 734 certiorari denied 68 S. Ct., 205, 332 U. S. 829, 92 L. Ed. 403 the court held that the railroad was not liable for injury to a car inspector where the injury was caused by the car inspector's own violation of a published safety rule requiring a blue flag to be placed on the track where men are working around cars.

In the case of Chicago, St. P., M. & O. R. Co. v. Arnold, decided by the Circuit Court of Appeals, Eighth Circuit, March 24, 1947, 160 F. (2), 1002, plaintiff sustained injuries when the car on which he was riding failed to clear spotted cars on a side track. The court held that it was reversible error for the trial court to refuse to instruct the jury that if the jury found that plaintiff's superior gave timely warning to him that there was not sufficient clearance to permit a man to ride a car past the spotted cars then the verdict must be for the railroad.

10. Did the District Court err in instructing the jury regarding an aggravation of a pre-existing injury?

The court charged the jury as follows:

> "That is not disputed; it is not disputed that the man has that injury; the extent of it, however, is disputed. I have forgotten the medical term that they used—oh, yes, a compression fracture." (R., 139.)

The court erred in instructing the jury that it was not disputed that the petitioner had an injury to his eighth dorsal vertebra, but that the extent of the injury was disputed. There is no testimony in the record of an aggravation of a pre-existing injury, and that was not an issue in the case. Respondent offered testimony to show that the injury to the eighth dorsal vertebra was an old injury. Petitioner attempted to prove that the fracture of the eighth dorsal vertebra occurred on June 22, 1948, and made no claim for aggravation of a pre-existing injury.

The court, by this instruction, brought an issue into the case which was not supported by the evidence, to the prejudice of the rights of the respondent.

11. Did the District Court err in instructing the jury to disregard the fact that petitioner received unemployment compensation benefits from the railroad retirement board?

The court charged the jury as follows with respect to the receipt of unemployment compensation benefits. (R., 140.)

> "There is no evidence about this compensation except that he got it. There is no evidence of the conditions of it or anything else."

This instruction was prejudicial to the rights of respondent and was contrary to the stipulation of counsel made in

open court, and contrary to the court's instruction regarding the stipulation, which was as follows:

> (Discussion between counsel and the court.)
> "The Court: There is a difference, ladies and gentlemen, except in this. Counsel are agreed that under the Federal Employer's Liability Act that you must, if you get unemployment compensation—what happens to it afterwards is something else—**you must assert that you are able and willi[illegible] to work.**" (R. 25, 26.) (Emphasis ours.)

One of the respondent's defenses was based on the fact that petitioner had drawn unemployment compensation benefits from the United States of America during the period from April 8, 1949, until February 25, 1950 and that, during said period, certified each week that he was able and willing to work. (R., 43.)

The court, by instructing the jury to disregard the question of unemployment compensation benefits, completely obliterated this issue from the case, to the prejudice of the rights of the respondent.

12. Did the District Court make a misstatement of law in charging the jury as follows:

> "Also, as I have heretofore instructed you, if you find by a preponderance of the evidence the defendant was not guilty of negligence which was a direct and proximate cause of the injuries to plaintiff, and you also find that negligence of the plaintiff contributed to his injuries, your verdict shall be for an amount representing the total amount of damages reduced by an amount in proportion to the amount of negligence if any, attributable to plaintiff." (R., 141.)

The error in this charge is apparent on its face. The court charges that even if the respondent was not negligent in any manner toward the petitioner, nevertheless the petitioner can still recover even if he was solely negligent. We

believe no comment is necessary on the prejudicial error in this charge.

13. Did the District Court make a misstatement of law in charging the jury as follows:

> "I also perhaps did mention something to the effect that the plaintiff couldn't blindly go ahead. I did that after I had given you the definition of ordinary care. If the defendant's conduct came up to that standard of care which in law is called ordinary care, it was not negligent and it is not liable to this plaintiff no matter what damage resulted from such conduct. That is a repeat of what I just said; if they are not negligent he can't recover from them. But, it is in again. **If his conduct fell below such standard of care then it was negligent, and if such conduct was the direct and proximate cause of the damages complained of, then the plaintiff may recover.** Likewise, the plaintiff is required to exercise that degree of care for his own safety that is required of the defendant; that is, ordinary care. And, forget the 'blindly' part. I was just trying to emphasize something. I realize that sometimes you emphasize and give the wrong impression. The definition of ordinary care is what I want you to follow." (R., 153, 154.) (Emphasis ours.)

Here again the error in this charge is apparent on its face. The jury is instructed that if the petitioner's conduct fell below such standard of care, then the respondent was negligent, and if such conduct was a direct and proximate cause of the damages complained of, then the petitioner may recover. The jury could not help being totally confused as to the law of the case, and the prejudice to this respondent is obvious.

14. Did the District Court err in instructing the jury as follows:

> "But, $300 a month is the figure that you would take into consideration and the years and that have

been outlined, and the percentage of disability covering those years. I give you those figures without building up anything at all, but the matter of damages is for you, taking everything into consideration." (R., 155.)

Petitioner had testified that his monthly earnings immediately prior to the accident were around $285.00 or 300.00 a month. (R., 28.) Petitioner did not testify that is earnings amounted to an average of $300.00 per month. n spite of this, however, the court instructed the jury that 300.00 was the figure that they would take into considera-on. The court also instructed the jury that they should ake the figure of $300.00 a month into consideration for ne years outlined. By years outlined, the court was re-erring to the statement of counsel for petitioner that peti-oner had a life expectancy of 24.10 years. The court also nstructed the jury that they should take into considera-ion the percentage of disability for the years outlined at 300.00 a month. The percentage of disability obviously eferred to the forty to sixty per cent disability about hich Dr. Ridgeway and Dr. Claybourne had testified. The ourt failed to take into consideration Dr. Pickett's testi-nony that the injury to petitioner's eighth dorsal vertebra as a result of an injury which petitioner had sustained rior to June 22, 1948. The court in so instructing the ury submitted a formula for assessing damages, all com-onent parts of which were incorrect and in error.

15. Did the District Court abuse its discretion in commenting on the evidence?

The court erred and abused its discretion in commenting n the evidence and thereby committed error prejudicial o the rights of the defendant. In the case of Home Insur-nce Co. v. Consolidated Bus Lines, 179 F. 2d., 768, (Fourth

Cir.), decided January 28, 1950, the court held that it was reversible error to stress the evidence and theory of one party prominently and fully, and not call attention to the main points of the opposite party's case.

The court in the instant case overemphasized petitioner's theory of the case and stressed every claim of the petitioner. On the other hand, the court completely nullified every defense of the respondent. Petitioner offered no evidence of the negligence of the respondent but claimed that the res ipsa loquitur rule of evidence applied. The court overemphasized this rule, misstated it, and so confused the jury as to the purpose and intent of the rule that the respondent was in fact charged out of court.

The court gave the jury the impression that in a case involving res ipsa loquitur, it was not necessary to prove negligence by a preponderance of the evidence. (R., 133.)

The court in instructing the jury minimized petitioner's duty to exercise ordinary care. (R., 132.)

The court overemphasized elements of damage that were not issues in the case. The court said that the petitioner suffered **"some humiliation."** (R., 129, 140, 141.)

After the respondent objected to the charge regarding humiliation, the court said (R., 153.):

> **"Now, there is a question of humiliation here. The word was used. It happened because I was quoting from another charge.** I think that you understood the limitation I put upon humiliation, and that is the humiliation that comes when a young man, a comparatively young man, fifty, is unable to do a full day's work at his job. That is all. That is a humiliation. I don't think that there is any other humiliation, and personally, I don't think that's a great deal of humiliation, either." (Emphasis ours.)

The court overemphasized the extent of petitioner's disability and the measure of damages. (R., 129.)

The court in instructing the jury completely nullified respondent's theory of the case. Respondent in its defense offered proof of the violation of a safety rule. The court instructed the jury to disregard the rule. (R., 137.)

Respondent in its defense offered evidence that petitioner could have blocked the ash pan up with wooden blocks to keep it from falling. The court said (R., 137):

> "The defendant claims that he should have put some blocks underneath it, but there is not one bit of evidence by anybody that that is the way anybody ever did it. The evidence is that this is the way they did it."

After respondent objected to this charge, the court said to the jury (R., 154):

> "Now, the court said it couldn't see how this man could have performed his work in any other manner. If you jurors think he could, from the evidence as you know it, that is up to you, and you are not to be biased by what I think the facts show at all. You are the judges of the facts, not me."

Respondent in its defense offered evidence that petitioner was in exclusive control of the repair operation and that Jaynes, the helper, was performing his work under petitioner's supervision. The court said (R., 136):

> "Two men were working on this job, and there is no question but what the man up above was under the supervision of the plaintiff here, but I instruct you now that that does not make any difference because the assumption of risk is not a part of this case. He does not assume the risk of a fellow employee." (R., 138.)

Respondent offered evidence to prove that after the accident of June 22, 1948, petitioner worked until he was furloughed in April of 1949; and that after he was furloughed

he applied for and received unemployment compensation from the railroad retirement board from April, 1949 to February, 1950 and that he signed for said benefits weekly. (R., 43.)

During the trial the court informed the jury of the stipulation of counsel with regard to the unemployment benefits as follows (R., 25, 26):

> (Discussion between counsel and the court.)
> "The Court: There is a difference, ladies and gentlemen, except in this. Counsel are agreed that under the Federal Employer's Liability Act that you must, if you get unemployment compensation—what happens to it afterwards is something else—**you must assert that you are able and willing to work.**" (Emphasis ours.)

In spite of this, the court said to the jury (R., 140):

> "There is no evidence about this compensation except that he got it. There is no evidence of the conditions of it, or anything else."

Respondent in its answer plead the defense of contributory negligence. The court, in the presence of the jury, remarked as follows (R., 130):

> "I do not believe, gentlemen, that there is any reason to submit to the jury the question of comparative negligence. Does either side think that?
> Mr. Alexander: We would like to be heard on that.
> The Court: Do you want it, or don't you?
> Mr. Alexander: Yes.
> The Court: Have you prepared a request on that?
> Mr. Alexander: We haven't.
> The Court: I would like to find out if there is any possible evidence of comparative negligence in this case. Approach the bench, please."

The court, after a conference with counsel, then instructed the jury on the issue of comparative negligence.

However, the jury could not have helped but feel that the court was of the opinion that there was no contributory negligence on the part of the petitioner.

The overemphasis of the petitioner's case is obvious. The complete nullification of respondent's defense is likewise obvious. The court submitted the claims and theories of the petitioner prominently and fully, and instead of the court calling their attention to the main points of the respondent's case the court instructed the jury to disregard them. **It is interesting to note that counsel for petitioner did not make one specific objection to the charge of the court.**

CONCLUSION.

Petitioner has requested the court consider the questions presented by him as well as all of the questions presented by the respondent on its appeal from the District Court to the Court of Appeals. An examination of the entire record in this case requires that the court affirm the judgment of the Court of Appeals for the Sixth Circuit and grant a new trial to the parties.

Respectfully submitted,

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